U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for September 1, 2023

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BOARD DECISIONS

Appellant: Calvin Wesley Turner, Jr.
Agency: Department of Agriculture
Decision Number: 2023 MSPB 25
Docket Number: DC-1221-21-0292-W-2
Issuance Date: August 30, 2023
Appeal Type: Individual Right of Action (IRA)
Action Type: IRA "1221" Non-appealable Action

WHISTLEBLOWING JURISDICTION
WHISTLEBLOWING PROTECTED "DISCLOSURE"

The appellant was employed as the Director of the National Finance Center (NFC). NFC is a nonappropriated fund (NAF) instrumentality, meaning that its budget is solely derived from the fees it charges customers for the services it provides. In or around January 2017, NFC provided an Interagency Agreement (IA) contract to one of its customers, the U.S. Department of the Agriculture's Financial Management Services (FMS), which estimated the cost of administrative services NFC would provide to FMS for Fiscal Year 2017 at $10.2 million. FMS objected that the IA cost was too high and stated that it only had $5.9 million available to pay for

NFC's services. The appellant subsequently raised concerns with his supervisory chain that NFC would not be able to recover the actual cost of the services it would provide to FMS based on the $5.9 million IA and that it would be forced to subsidize the losses. Eventually, the appellant signed a $6.3 million IA with FMS that included a provision stating that anything outside of the services provided for in the IA would be subject to a new agreement.

In October 2020, the appellant filed a complaint with the Office of Special Counsel (OSC) alleging that the agency retaliated against him for his disclosure challenging the IA by taking a number of personnel actions against him, including revoking his signing authority for IAs over $5 million, lowering his performance rating for two annual performance appraisals, issuing him a letter of counseling and a letter of reprimand, subjecting him to a random drug test, and placing him on administrative leave. After OSC closed its investigation, the appellant filed an individual right of action (IRA) appeal with the Board. After holding the appellant's requested hearing, the administrative judge issued an initial decision denying the appellant's request for corrective action. She found that the appellant had not established that he had a reasonable belief that his disclosures about the FMS IA evidenced a violation of law, rule, or regulation and so he had not established that he made a protected disclosure. Consequently, she denied his request for corrective action.

Holding: NAF employees of non-military instrumentalities, like the appellant, meet the definition of "employee" under 5 U.S.C. § 2105(a) and therefore can file IRA appeals.

1. The Board and the U.S. Court of Appeals for the Federal Circuit have broadly held that NAF employees do not have the right to file an IRA appeal, but those cases all concerned appeals filed by NAF employees of a military exchange or instrumentality.
2. The language in 5 U.S.C. § 2105(c) specifically excludes from the definition of "employee" for purposes of filing an IRA appeal under 5 U.S.C. § 1221(a), NAF employees who work for military exchanges and other instrumentalities of the United States "under the jurisdiction of the armed forces conducted for comfort, pleasure, contentment, and mental and physical improvement of personnel of the armed forces."
3. The NAF the appellant works for, NFC, is not a military exchange or instrumentality and so the exclusion from Board jurisdiction over IRA appeals set forth in section 2105(c) does not apply here and the Board has jurisdiction over the appeal.

Holding: The appellant established that he reasonably believed that his disclosures evidenced a violation of law, and remand is required for further development of the record.

1. The administrative judge found that the appellant did not establish that he reasonably believed that his disclosure regarding the proposed $5.9 million IA evidenced a violation of law, rule, or regulation because NFC's costs were not established by law and could be changed, the appellant and his supervisor made efforts to ensure that NFC would fully recover its costs from FMS, and the IAs were part of a negotiation process that inherently involved estimates that would be modified later.
2. The Board acknowledged that the proposed IA involved estimates that were subject to change but noted that those estimates must be based on actual projections of expected costs, and NFC was aware that the $5.9 million figure was not representative of the actual cost of services it was to provide to FMS.
3. That the appellant's concerns were reasonable was further supported by the fact that FMS had a history of not fully paying for the actual cost of services NFC provided, and by testimony from three witnesses stating that they would not have signed the IA under similar circumstances out of fear that it would violate the Antideficiency Act.
4. Additionally, because the NFC is a NAF and derives its budget solely from the fees it charges, it would have to make up potential losses from the FMS IA by using its statutorily limited profits, reallocating funds from other customers, or both.
5. Consequently, the Board determined that a disinterested observer could reasonably conclude that the appellant's disclosure regarding the IA evidenced a violation of a law, rule, or regulation.
6. The Board remanded the appeal for the administrative judge to further develop the record and to make findings concerning whether the appellant proved that his protected disclosures were a contributing factor in the challenged personnel actions, and if so, whether the agency proved by clear and convincing evidence that it would have taken the same action absent the appellant's protected disclosures.